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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN PRITCHARD, Defendant and Appellant.	2d Crim. No. B182577 (Super. Ct. No. NA044772-01) (Los Angeles County)

Stephen O'Neal Pritchard appeals from the judgment entered following his conviction by a jury on four counts of committing a lewd act upon a child. (Pen.Code, § 288, subd. (a).)[1] The trial court found true the following allegations: (1) that appellant had previously been convicted of a serious felony within the meaning of section 667, subdivision (a)(1); (2) that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b); (3) that appellant was a habitual sexual offender within the meaning of section 667.71; (4) that appellant had previously been convicted of a violation of section 288, subdivision (b) (forcible lewd act upon a child), within the meaning of section 667.61, subdivisions (a) and (d)(1); and (5) that appellant had been convicted of four serious or violent felonies within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds.(a)-(d), 667, subds. (b)-(i).) He

[1] All statutory references are to the Penal Code unless otherwise stated.

was sentenced to prison for four consecutive terms of 75 years to life, plus five years for the prior serious felony conviction within the meaning of section 667, subdivision (a)(1).

Appellant contends that (1) venue was improper; (2) he was denied the effective assistance of counsel; (3) the prosecutor should have been estopped from moving to reinstate two counts that had earlier been combined into a single count; (4) the trial court erroneously denied his motion for a mistrial; and (5) the prosecutor engaged in misconduct by improperly vouching for the credibility of the child and her mother. We affirm.

Facts

Mariah M., born in July 1992, is the daughter of Chad and Terri M. She has a brother named C.J. Mariah M.'s paternal grandmother is Sandy M., who had a fiancé named Jim S.

In July 1999 Sandy M. and Jim S. employed appellant to do construction work for their manufactured housing business. In late October or early November, 1999, appellant was introduced to Mariah M. and C.J.

Between March 6 and March 9, 2000, appellant drove his truck to Terri M.'s house to pick up Mariah M. and C.J for visitation with their father, Chad M. Terri M.'s house was in the City of Long Beach, County of Los Angeles. Appellant drove Mariah M. and C.J. to Chad M.'s house in Orange County. Appellant, Mariah M., C.J., and Chad M. then went to Chad M.'s place of work to make sure that the lights were turned off and the premises were locked. From there they went for a meal to the Hometown Buffet in Orange County. Appellant drove with Mariah M. in his truck, and Chad M. drove separately with C.J. in Chad M.'s vehicle.

On the way to the Hometown Buffet, Mariah M. felt tired. (She has Epstein-Barr Virus, which makes her lethargic.) While she was lying down in the seat of the truck, appellant started tickling her "up [her] leg" and rubbed the outside of her vagina. Mariah M. sat up because she "didn't want him touching [her] in inappropriate parts."

Mariah M. was lying down again when appellant "just started going up [her] shorts . . . with his hand" and "fondled her vaginal area over her clothing." Appellant told Mariah M. that he loved her and that he was going to marry her. Mariah M. sat up and told appellant to leave her alone. A short time later, they arrived at the Hometown Buffet.

C.J., Chad M., Mariah M., and appellant entered the restaurant and sat together at a booth. Mariah M. sat next to appellant and across from C.J. and Chad M. While C.J. and Chad M. were waiting in line at the buffet, Mariah M. lay down in the booth and appellant "fondled her vaginal area over her clothes . . . ."

After Mariah M. first met appellant and before she went with him to the Hometown Buffet, appellant kissed her on the mouth "three or more" times. Mariah M. could not remember when he had kissed her or where the kissing had occurred.

On April 30, 2000, Terri M. gave a birthday party for C.J. at her house in Long Beach. Appellant and Mariah M. attended the party. While they were alone in the living room, appellant held Mariah M. down on a couch and gave her a "yucky," "wet" kiss on her lips. Appellant "pushed [her] down and held [her] arms over [her] head and [her] legs straight." She "kept on yelling, 'Stop.' "

Later during C.J.'s birthday party, appellant confronted Mariah M. in a hallway as she was walking to her bedroom. Appellant "pushed [her] up against the hallway" and gave her another "wet" kiss on the lips. Appellant said that he loved Mariah M. and asked her to marry him.

At the party, appellant followed Mariah M. "everywhere [she] went." He put Mariah M. on his lap and slid down a slide. "[H]e would not only touch [Mariah M.], but he would go up to [her] friends and . . . pinch them [in] their stomach[s]."

When Mariah M. was inside a bounce house that had been rented for the party, appellant kept holding her and "kept on trying to pick [her] up . . . ." Kandice, Mariah M.'s cousin, tried to block appellant from grabbing Mariah M. Appellant "picked her [Kandice] up and swung her around and threw her." Mariah M. ran out of the bounce

house to the sidewalk. Appellant ran after her. He grabbed Mariah M. and pushed her against a van parked in the street, pinning her arms behind her back. Appellant "started shaking [her] and hitting [her] head against the van." Appellant said, "What's wrong with you?"

Mariah M.'s aunt, Lori Y., intervened. It appeared to her "like . . . [appellant] was trying to kiss [Mariah M.]." Lori Y. asked appellant what he was doing. Appellant said, "I am sorry. I got out of control." He started crying and ran to the other side of the van.

During the party, adult guests came up to Terri M. and said they were worried about appellant. They were concerned that he "was a little close to the girls . . . ." "It was obvious that his behavior wasn't normal for an adult . . . ." Appellant's "interactions with the children were inappropriate . . . ." Terri M.'s sister, Lori, told her that appellant had pinned Mariah M. against a van and had yelled at her. Terri M. "felt that it was improper behavior for an adult to do that . . . ." She approached appellant and said, " . . . I have people here really uncomfortable, and I think it's time that I have to ask you to leave." Appellant replied, "I'm not leaving until I see Mariah." Appellant searched the house but was unable to find her. When appellant left, he called Terri M. and other adult guests "witches" and screamed, "I love you Mariah." He was very angry and "stomped his feet."

The prosecutor was permitted to introduce evidence of two prior uncharged sexual offenses committed by appellant. During the first offense, committed in October 1992, appellant grabbed a nine-year-old girl and forced her to the ground. He pulled down her shorts and underwear and took off his pants. He then rubbed his penis against her vaginal area until he ejaculated.

During the second offense, committed in November 1992, appellant put his hands underneath the underwear of a six-year-old girl. He rubbed her buttocks and touched her vagina.

Jury Instructions

The information charged appellant with four counts of committing a lewd act upon Mariah M. Each of the first two counts alleged that a lewd act had been committed at the birthday party on April 30, 2000. The trial court instructed the jury that "[c]ount 1 concerns the alleged incident on the couch in the house at the time of the party. . . . Count 2 [concerns the alleged incident in] the hallway in the house at the time of the party."

The third count alleged that appellant had committed a lewd act between March 6 and March 9, 2000. The trial court instructed the jury that count 3 concerns the alleged incident "occurring on the drive to the Hometown Buffet" but does not concern "anything occurring at the Hometown Buffet." Thus, "incidents allegedly occurring at the Hometown Buffet itself cannot be a basis for a conviction on count 3."

The fourth count alleged that appellant had committed a lewd act between July 26, 1999, and April 29, 2000. The trial court instructed the jury that count 4 concerns the "alleged incident or incidents involving alleged kissing" during that time period.

Venue

The case was tried in Los Angeles County. Appellant contends that venue in Los Angeles County was improper as to counts 3 and count 4: "Count 3 took place wholly within Orange County and there is no evidence as to where, or under what circumstances, Count 4 purportedly took place."

Before trial appellant objected to venue in Los Angeles County, but the objection was directed only to count 3. Appellant did not contend that venue was improper on count 4 until after both sides had rested. Because of this delay, appellant has forfeited any claim of improper venue on count 4: "[A] defendant in a felony proceeding forfeits a claim of improper venue when he or she fails specifically to raise

such an objection prior to the commencement of trial." (*People v. Simon* (2001) 25 Cal.4th 1082, 1086.)[2]

As to count 3, the trial court reasoned as follows in rejecting appellant's claim of improper venue: " . . . I believe there is sufficient evidence from the drive beginning in L.A. County, even though . . . there was a stop-over in Orange County, sufficient nexus to bring count 3 into our jurisdiction."

"[T]he case law does not establish whether the trial court's ruling on venue should be reviewed under a deferential or independent standard." (*People v. Betts* (2005) 34 Cal.4th 1039, 1058, fn. 13.) Pursuant to section 783, under either standard we would uphold the trial court's ruling that venue was proper in Los Angeles County. Section 783 provides: "When a public offense is committed in this State, . . . on a . . . car [or] motor vehicle, . . . the jurisdiction is in any competent court, through, on, or over the jurisdictional territory of which the . . . car [or] motor vehicle . . . passes in the course of its . . . trip, or in the jurisdictional territory of which the . . . trip terminates."

The trip to the Hometown Buffet began at Terri M.'s house in the City of Long Beach in Los Angeles County. Appellant picked up Mariah M. and C.J. at this location. During the course of the trip, appellant's truck passed through Los Angeles and Orange counties. The trial court instructed the jury that count 3 concerns only the alleged incident "occurring on the drive to the Hometown Buffet" and does not concern "anything occurring at the Hometown Buffet." Since count 3 encompassed only the offense committed inside appellant's vehicle during the trip to the Hometown Buffet, venue for that offense was proper in Los Angeles County.

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[2] In his reply brief, appellant argues for the first time that counsel's failue to object to venue on count 4 violated his constitutional right to the effective assistance of counsel. We decline to consider this untimely argument. (*People v Murphy* (2001) 25 Cal.4th 136, 159; *People v. King* (1991) 1 Cal.App.4th 288, 297, fn. 12.)

Furthermore, venue in Los Angeles County was proper pursuant to section 781, which provides: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."[3] "Section 781 is construed 'liberally in order to achieve its underlying purpose, which is to expand venue beyond the single county in which a crime may be said to have been committed.' The phrase 'acts or effects . . . requisite to the consummation' of a crime does not require that those acts amount to an element of the crime. [Citation.] These words encompass preparatory acts. [Citations.]" (*People v. Betts, supra,* 34 Cal.4th at p. 1057.)

Sufficient preparatory acts occurred in Los Angeles County to support venue in that county. "The evidence presented at trial supports the conclusion that [appellant] picked up [Mariah M.] from her mother's house in [Los Angeles] County with the intent to molest her, and drove her to [Orange] County, where he had the opportunity to molest her." (*People v. Betts, supra,* 34 Cal.4th at p. 1058.)

Effective Assistance of Counsel

Appellant claims that he was denied the effective assistance of counsel. "The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) In determining whether counsel was deficient, we measure counsel's performance "against the standard of a reasonably competent attorney . . . ." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) "A defendant must prove prejudice that is a '

[3] " 'Jurisdictional territory,' in this context, signifies a county. [Citation.]" (*People v. Betts, supra,* 34 Cal.4th at p. 1057, fn. 12.)

"demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington, supra,* at p. 697.)

Appellant contends that, on numerous occasions, counsel failed to object to inadmissible hearsay and opinion evidence "that various acts of Appellant with respect to the victim, Mariah M., were 'inappropriate.' " Appellant argues: "In a pattern of evidence, the prosecutor offered testimony of several witnesses designed to prove that in the opinion of adults that saw Appellant interact with Mariah, his behavior was abnormal or inappropriate."

We need not consider whether counsel was deficient in not objecting to this evidence. Appellant has failed to "show that there is a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) In other words, he has failed to establish "a probability sufficient to undermine confidence in the outcome." (***Ibid***.) Appellant was not charged with engaging in inappropriate or abnormal behavior. He was charged in four counts with "willfully and lewdly" committing "a lewd or lascivious act" upon Mariah M. "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of himself or Mariah M. (§ 288, subd. (a).) The witnesses did not opine that appellant had committed a "lewd or lascivious act." (***Ibid***.) Nor did they opine that he had acted "with the intent

of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of appellant or Mariah M. (***Ibid***.) They merely opined what was obvious to everyone: that appellant's behavior in relation to Mariah M. was inappropriate and not normal. Furthermore, since these witnesses had not seen the commission of the particular acts underlying counts 1 through 4, they did not express an opinion concerning these acts.

Appellant contends that counsel made a mistake during opening statement by displaying to the jury a chart containing a statement that appellant was required to register as a sex offender pursuant to section 290. We again need not determine whether counsel was deficient because appellant has failed to "prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank, supra,* 16 Cal.4th at p. 1241.) Trial counsel told the court that he had "made a mistake in blowing up . . . a statement about [section] 290, sex registration." But counsel pointed out that this issue had "never been discussed in front of the jury." The prosecutor said that the sex registration statement was "in extremely small print," and that he had "only read it because [he] went up to [the chart] and saw it." Since the actual chart has not been brought before this court, we can only speculate as to the impact, if any, of the sex registration statement upon the jury.

Estoppel

Counts 1 and 2 of the information alleged offenses committed during C.J.'s birthday party at Terri M.'s house on April 30, 2000. Prior to trial, the prosecutor stated in open court that he intended to combine the two counts into a single count "so there's one count for the event of April 30th . . . ." The trial court responded, "Very well." However, the information was never formally amended.

After both parties had rested, the prosecutor requested that original counts 1 and 2 be reinstated. The trial court asked appellant's counsel if he had "a position as to that." Counsel did not respond. Later, the court asked counsel if he wished to be heard on the matter. Counsel responded, "No, I just -- I want to make sure that the jury understands these charges. It's so critical." Counsel reiterated the factual basis

for each of counts 1 through 4. He then stated, "All right. The defense is prepared, and that's the way the defense has been positioned since the preliminary examination." Without objection, the trial court then granted the prosecutor's request to reinstate original counts 1 and 2.

Appellant contends that, pursuant to "the doctrine of judicial estoppel and fundamental fairness," respondent should have been "estopped" from moving to reinstate original counts 1 and 2. Accordingly, appellant maintains that his conviction on count 2 must be reversed.

By not objecting in the trial court to the reinstatement of original counts 1 and 2, appellant waived the issue: " ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." ' [Citation.] ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.] ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

The waiver doctrine has been applied to preclude a defendant from contending for the first time on appeal that he was denied due process because, without proper notice, the information was amended during trial to charge an additional offense: "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an

objection based on lack of notice may not be raised on appeal. [Citations.] . . . To prevent speculation on a favorable verdict, a reasonable and fair rule . . . is that a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*People v. Toro* (1989) 47 Cal.3d 966, 976, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) Here, instead of contending that he was surprised by the prosecutor's request to reinstate original counts 1 and 2, counsel stated: "The defense is prepared, and that's the way the defense has been positioned since the preliminary examination." By this statement and by failing to object, appellant impliedly consented to the reinstatement of original counts 1 and 2.[4]

Mistrial

During respondent's direct examination, Kristen Y. testified that, after appellant had left the party, she and other persons "started looking up on the computer" "Megan's laws, and you know, stuff like that." Appellant objected. In response to the objection, the prosecutor stated, "I won't ask for the conclusion of that search."

Based on the witness's reference to Megan's Law, appellant moved for a mistrial. The trial court denied the motion and admonished the jury as follows: "There was testimony . . . about a computer search involving -- a particular website . . . . That's struck from the evidence. You're not to consider it for any reason. If you've written down notes about it, cross them out." Appellant contends that, because the trial court denied his motion for a mistrial, he was "deprived of due process and a fair trial . . . ."

"California's Megan's Law (Penal Code §§ 290.4, 290.45) is a scheme of detailed provisions for the collection and limited disclosure of information regarding sex offenders who are required to register by Penal Code section 290. Section 290.4

[4] Since we conclude that the estoppel issue has been waived, we need not consider respondent's contention that the doctrine of judicial estoppel is inapplicable in criminal proceedings.

deals with collection of information and disclosure by telephone and CD-ROM. Section 290.45 deals with community notification." (*Fredenburg v. City of Fremont* (2004) 119 Cal.App.4th 408, 413, fn. omitted.) Pursuant to Evidence Code sections 452, subdivision (h), and 459, we take judicial notice that the California Department of Justice maintains an internet web site - http://www.meganslaw.ca.gov/ - listing persons required to register in California as sex offenders.

" ' "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." ' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.)

The trial court did not abuse its discretion in concluding that any prejudicial effect arising from the witness's reference to Megan's Law could be cured by an admonition to the jury to disregard this evidence. The prejudicial effect was minimal because the results of the computer search were not disclosed to the jury. "A jury will generally be presumed to have followed an admonition to disregard improper evidence or comments, as '[i]t is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692.)

Vouching for Credibility of Mariah M. and her Mother

Appellant contends that the prosecutor engaged in misconduct by improperly vouching for the credibility of Mariah M. and her mother. The alleged vouching occurred when the prosecutor asked them if they were telling the truth, and they responded affirmatively. Appellant "failed to object to [the prosecutor's questions] or seek a curative admonition; and thus the claim [of improperly vouching for the credibility of prosecution witnesses] is forfeited. [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

In any event, appellant's claim is without merit. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971.) By merely asking Mariah M. and her mother whether they were telling the truth, the prosecutor did not improperly vouch for their credibility. The prosecutor's questions did not offer the impression that he had "taken steps to assure [their] truthfulness at trial." (*Ibid*.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Richard Romero, Judge

Superior Court County of Los Angeles

William J. Kopeny & Associates, for Appellant.

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